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### Decedent Estate Law--1931 Amendments--Source of Intestate Share Allowed After-Acquired Spouse or Issue under Section 35

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pending the termination of the litigation and such was effected by Section 882 of the Civil Practice Act prior to its amendment. If justice is to continue unimpeded, *ex parte* injunctions must be restored to the statute books by the repeal of the aforementioned amendment.

CHARLES VEIT.

DECEDENT ESTATE LAW—1931 AMENDMENTS—SOURCE OF INTESTATE SHARE ALLOWED AFTER-ACQUIRED SPOUSE OR ISSUE UNDER SECTION 35.—The doctrine of revocation of a will by the subsequent marriage and birth of children of the testator had its inception in the Roman Law.<sup>1</sup> Cicero tells us that there at all times exists a presumption that it was not the testator's intention in making his will to exclude from consideration the natural beneficiaries of his worldly goods. Therefore, when he died leaving a child born after the will unprovided for, the will should be revoked and the child awarded his legal share in the estate. To exclude children, under the rule as laid down by this decision, it was necessary expressly to disinherit them in the will.<sup>2</sup>

This theory, in substance, was followed by the majority of the countries adopting the civil law.<sup>3</sup> In England, the ecclesiastical Courts limited it to cases in which there had occurred a marriage coupled with the birth of children subsequent to the making of a will disposing of the whole estate, applying the doctrine first to personal property only,<sup>4</sup> and, after considerable controversy, to realty.<sup>5</sup>

The first New York case upon the subject, that of *Brush v. Wilkins*,<sup>6</sup> decided in 1820, on the authority of the previous English decisions, ruled that mere marriage alone or the birth of children subsequent to the making of a will constituted no revocation; that in order in any event to effect such a result, there must be a subsequent marriage plus a child born of that union, such happenings raising only a presumption of revocation, which was not conclusive.

The Revised Statutes of 1830 created a distinction between children born after the will, and the subsequent marriage and birth of issue of the testator, with regard to revocation. One provision,<sup>7</sup> later Section 26 of our Decedent Estate Law, declared that when a man executed a will and, thereafter, a child was born which sur-

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<sup>1</sup> I DAVIDS, NEW YORK LAW OF WILLS (1923) p. 657, §294.

<sup>2</sup> *Brush v. Wilkins*, 4 Johns. Ch. 511 (N. Y. 1820), Kent. Chancellor, citing Cicero de Orat. 1.57.

<sup>3</sup> *Sherry v. Lozier*, 1 Bradf. 450 (N. Y. 1851); *Matter of Rossignot*, 50 Misc. 231, 120 N. Y. Supp. 623 (1906).

<sup>4</sup> *Lugg v. Lugg*, 1 Ld. Raym. 441, Salk. 592 (Eng. 1699).

<sup>5</sup> *Christopher v. Christopher*, Dick. Rep. 445 (Eng. 1771).

<sup>6</sup> *Supra* note 2.

<sup>7</sup> R. S. pt. 2, c. 6, tit. 1, art. 3, §49 (1830).

vived him without mention in his will, in the absence of evidence showing that the testator intended to cut off such a child, the will was revoked as to such child who was given his intestate share.<sup>8</sup> A separate enactment,<sup>9</sup> now Section 35, which is our principal concern at this writing, stated that the subsequent marriage of a man and the birth of issue of that union were to be deemed a complete revocation of a will leaving such issue unprovided for, or otherwise mentioned as to indicate an intention not to make such provision,<sup>10</sup> and that no evidence to rebut the presumption of such revocation should be received.<sup>11</sup>

A necessary incident of revocation in either of the above circumstances was the disposition by the will of the whole of the testator's estate. A further provision,<sup>12</sup> later Section 36, provided that the will of an unmarried woman was revoked by her subsequent marriage irrespective of the birth of issue.<sup>13</sup>

In 1919,<sup>14</sup> the Legislature abolished this distinction between the sexes, rewriting Section 35 so that it provided that the subsequent marriage alone of either a man or a woman was sufficient to partially revoke a will.<sup>15</sup> Specifically, this amendment declared that a subsequently acquired husband, wife or the issue<sup>16</sup> of such marriage, surviving the testator, unprovided for in the will, or, as previously provided, otherwise mentioned as to indicate an intention not to make such provision, should receive the same portion of the estate as would have been received had such will not been made.<sup>17</sup> These

<sup>8</sup> Matter of Campbell, 87 Misc. 83, 150 N. Y. Supp. 416 (1914); Matter of Bostwick, 78 Misc. 695, 140 N. Y. Supp. 588 (1912); Sanford v. Sanford, 61 Barb. 293 (1872), *aff'd*, 4 Hun 753 (N. Y. 1875).

<sup>9</sup> *Supra* note 7, §43.

<sup>10</sup> Matter of Schuster, 111 Misc. 534, 181 N. Y. Supp. 500 (1920); Matter of Andrest, 96 Misc. 389, 160 N. Y. Supp. 505 (1916); Matter of Del Genovese, 169 App. Div. 140, 154 N. Y. Supp. 806 (2d Dept. 1915).

<sup>11</sup> *Vide* original note of Revisers outlining reasons for inclusion of this clause, 3 R. S. App., p. 631, §50 (2d ed. 1836). In Matter of Del Genovese, *supra* note 10, p. 144: "Revocation in such circumstances works no hardship. It brings about a descent and distribution under the just and politic rules prescribed for intestacy and is aimed for the care and protection of children."

<sup>12</sup> *Supra* note 7, §44.

<sup>13</sup> Matter of McClure, 105 Misc. 347, 173 N. Y. Supp. 206 (1918); Kloborg v. Teller, 103 Misc. 641, 171 N. Y. Supp. 947 (1918); Matter of Schuster, *supra* note 10. This enactment was not repealed by implication by, nor was it considered inconsistent with, the Married Woman's Property Acts of 1848, 1849 and 1860. Brown v. Clark, 77 N. Y. 369 (1849); Loomis v. Loomis, 51 Barb. 257 (N. Y. 1868).

<sup>14</sup> Laws of 1919, c. 293, §1.

<sup>15</sup> This disparity was removed in England as early as 1838 by the Statute of Wills (7 Wm. IV and 1 Vict., c. 26, §18), *vide* JARMAN, WILLS (Am. ed. 1881) p. 783.

<sup>16</sup> "Issue, as mentioned in this section, means the first lineal living descendant of the blood of the testator." Matter of Schuster, *supra* note 13.

<sup>17</sup> Matter of Gaffken, 197 App. Div. 257, 188 N. Y. Supp. 852 (2d Dept. 1921). *aff'g*, 114 Misc. 693, 187 N. Y. Supp. 255, and *aff'd* without opinion in 233 N. Y. 688, 135 N. E. 971 (1922); Matter of Cutler, 114 Misc. 203, 186 N. Y. Supp. 271 (1921); Matter of Dexter, 116 Misc. 17, 189 N. Y. Supp. 366 (1921); Matter of White, 112 Misc. 433, 183 N. Y. Supp. 129 (1920).

additional provisions gave to the after-acquired spouse or the issue of this marriage the same rights as had previously been granted to an after-born child under Section 26. By the same chapter, Section 36 was repealed.<sup>18</sup>

Upon the enactment of the provision of the Revised Statutes referred to above (Section 26) providing for the partial intestacy of a testator leaving after-born children unprovided for, the Legislature indicated the source out of which such a child's share was to be derived, expressly stating that the legatees and devisees mentioned in the will should contribute proportionately to the after-born child its intestate share,<sup>19</sup> and a separate enactment,<sup>20</sup> now Section 28, gave to such child a right of action to recover the same proportionately from each legatee and devisee.<sup>21</sup> However, Section 35, though now containing provisions for the after-acquired spouse or issue identical with those of Section 26, was silent as to the fund to be used in making up the shares of the persons benefiting thereby.

As no definite provision similar to that contained in Section 26, providing for the proportionate abatement of the legacies and devises made under the will, was inserted in Section 35, the shares of the husband, wife or issue mentioned therein were construed as additional charges upon the estate, and, under the general rule that when a testator has made specific bequests in his will, it was his intention that such bequests should not abate unless rendered necessary by lack of funds, the shares of such spouse or issue were taken entirely from the residuary of the estate, the particular legacies remaining untouched unless such residuary was insufficient to satisfy such intestate shares in full.

As in the vast majority of cases, the residuary legatees are those nearest in relationship to the testator, and, consequently, the most worthy recipients of his goods, it will readily be seen that this statute, originally designed to prevent an injustice, was in reality the procuring cause of a hardship upon those as much entitled to remembrance by the testator as the persons the Legislature was endeavoring to protect. The residuary legatees, bearing the complete burden of the partial revocation under Section 35, were in many cases wholly deprived of their rightful shares, while others mentioned in the will,

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<sup>18</sup> *Supra* note 14, §2; *Matter of Gaffken*, *supra* note 17.

<sup>19</sup> *Mitchell v. Blaine*, 5 Paige 588 (N. Y. 1836). In *Rockwell v. Geery*, 4 Hun 606 (N. Y. 1875), the Court said: "The object of the Statute can only be accomplished by requiring each to contribute in proportion to his devise to make up such share of the property as would have gone to the afterborn in case of intestacy, and subjecting each devisee to the same burdens as the after-born in proportion to the estate held."

<sup>20</sup> Former §1868, Code of Civil Procedure, repealed by Laws of 1909, c. 18, and substituted by §26, DECEDENT ESTATE LAW.

<sup>21</sup> *Wormser v. Croce*, 120 App. Div. 287, 104 N. Y. Supp. 1090 (1st Dept. 1907); *Matter of Sauer*, 89 Misc. 105, 151 N. Y. Supp. 465 (1915).

who might have been strangers in blood to the testator, received their portions of the estate undiminished.<sup>22</sup>

To correct this evil, the Legislature in the regular 1931 session amended Section 35 in order to conform to the more equitable provisions of Section 26, and provided for the proportionate contribution by the particular legatees and devisees to make up the shares of the subsequently acquired spouse or issue.<sup>23</sup> This section, as amended, reads as follows:

"35. REVOCATION BY MARRIAGE. If after making any will, such testator marries, and the husband or wife, or any issue of such marriage, survives the testator, such will shall be deemed revoked as to them, unless provision shall have been made for them by some settlement, or they shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and such surviving husband or wife, and the issue of such marriage shall be entitled to the same rights in, and to the same share or portion of the estate of said testator as they would have been, if such will had not been made. *Such husband or wife or issue of any such marriage shall be entitled to such share or portion of the estate from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will.* No evidence to rebut such presumption of revocation shall be received, except as herein provided." (Italics new.)

Section 28 was also amended by the same act, in order to allow the spouse or issue the same right of action as is accorded to the after-born children.<sup>24</sup> The following is the revised wording of the Statute:

"28. ACTION BY CHILD BORN AFTER MAKING A WILL, OR BY SUBSCRIBING WITNESS, OR BY SURVIVING HUSBAND, WIFE OR ISSUE AFTER REVOCATION BY MARRIAGE. A child born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, *or the surviving husband, or wife, or the issue entitled to succeed to a share of such property under the provisions of section thirty-five of this article,* may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; and he is subject to the

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<sup>22</sup> 1931 Report of the Commission to Investigate Defects in the Laws of Estates, Legislative Document No. 69, p. 86.

<sup>23</sup> Laws of 1931, c. 562, §3, in effect April 21, 1931.

<sup>24</sup> *Ibid.* §2.

same liabilities and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed." (*Italics new.*)

These new amendments are not retroactive but apply only to wills of decedents dying subsequent to their taking effect.<sup>25</sup>

Students and practitioners alike, it is anticipated, will agree that these new amendments are steps forward in the logical and just development of a statute founded on the equitable theory that those bound by ties of blood to the testator are the natural objects of his bounty.

WILLIAM J. CAHILL.

FACTORS LIENS — RECENT AMENDMENTS TO NEW YORK STATUTE.—As it is customary to read in textbooks that by the common law a factor has a general lien upon all the goods of his principal in his possession and upon the price of such that are lawfully sold by him, one might suppose that this is a right of great antiquity whereof the memory of man runneth not to the contrary.<sup>1</sup> Yet a search of the Year Books, the early statutes, Glanville's *Tractatus de Legibus Angliæ*, Bracton's *de Legibus et Consuetudinibus Angliæ*, Coke's *Institutes*, and even Blackstone's *Commentaries*, will reveal no trace or inkling that such a lien was recognized or enforced at the common law. In fact it is not until the middle of the eighteenth century that we find this right enforced in England, where the case of *Kruger v. Wilcox*<sup>2</sup> decided by Lord Hardwicke during that period so characteristic for the growth of the common law, is strikingly illustrated the ease with which the great Chancellors and Judges of that time incorporated the principles of the law merchant into the common law. When this case was brought before Lord Hardwicke he called before him four merchants and examined them upon the usage and customs of merchants in regard to such a lien. The four merchants all agreed that if there is a course of dealings and general account between the merchant and factor he may retain the ship and goods or produce for such balance of his account as well as for his charges. Lord Hardwicke then gave his opinion that a factor has a lien. Although this view was later confirmed by Lord Mansfield<sup>3</sup> and Lord Kenyon<sup>4</sup> we learn from a

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<sup>25</sup> *Ibid.*, §10.

<sup>1</sup> 2 MECHEM, *LAW OF AGENCY* (2d ed. 1914) §2559.

<sup>2</sup> *Kruger v. Wilcox*, 1 Ambler 252 (1755).

<sup>3</sup> *Godin v. London Assurance Co.*, 1 Burr. 489 (1758).

<sup>4</sup> *Walker v. Birch*, 6 T. R. 258 (1795).